

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

ALVIE ELLIOTT BUTCHER,
Petitioner,

Civil No. 10-1209-BR

ORDER

v.

MARK NOOTH,
Respondent.

BROWN, Judge.

Petitioner, an inmate at the Snake River Correctional Institution, brings this habeas corpus action pursuant to 28 U.S.C. § 2254. On October 7, 2010, this Court issued an Order requiring Petitioner to show cause why his Petition for Writ of Habeas Corpus should not be summarily dismissed on the basis that this Court lacks subject matter jurisdiction over a successive Petition without an order of authorization from the Ninth Circuit. See 28 U.S.C. § 2244(b)(3)(A). Currently before the Court is Petitioner's "Show Cause Order," (#12), which the Court construes a response to the Order to Show Cause.

In his response, Petitioner argues this case is not successive because his prior Petition for Writ of Habeas Corpus was denied on the basis of procedural default. Petitioner is incorrect. "[T]he dismissal of a first petition with prejudice because of a procedural default (and a failure to show cause and prejudice) forecloses the possibility that the underlying claims will be addressed." *McNabb v. Yates*, 576 F.3d 1028, 1029 (9th Cir. 2009) (citing *Henderson v. Lampert*, 396 F.3d 1049, 1053 (9th Cir. 2005)). "Such a dismissal therefore constitutes a disposition on the merits and renders a subsequent petition second or successive for the purposes of 28 U.S.C. § 2254." *Id.* (Footnote omitted.)

Petitioner has not demonstrated that the Ninth Circuit granted an order allowing his successive petition. As such, this Court lacks subject matter jurisdiction, and the Petition for Writ of Habeas Corpus must be dismissed.

CONCLUSION

For these reasons, IT IS ORDERED that the Petition for Writ of Habeas Corpus is DISMISSED.

IT IS SO ORDERED.

DATED this 30th day of November, 2010.

/s/ Anna J. Brown

ANNA J. BROWN
United States Judge

